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Nos. 86-825 and 86-826



# In the Supreme Court of the United States

OCTOBER TERM, 1986

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GREGORY JONES AND BYRON K. WARE, PETITIONERS

*v.*

UNITED STATES OF AMERICA

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ROGER E. THOMAS, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## QUESTIONS PRESENTED

1. Whether, on the facts of this case, the court-martial convening authority was disqualified as an "accuser" within the meaning of Article 1(9) of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 801(9).

2. Whether the courts below erred in applying the constitutional harmless error standard of *Chapman* v. *California*, 386 U.S. 18 (1967), to instances of unlawful command influence, in violation of Article 37, UCMJ, 10 U.S.C. 837, rather than in applying a rule of per se reversal.

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## OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-19a)[1] in *United States* v. *Thomas, United States* v. *Cook,* and *United States* v. *Giarratano* is reported at 22 M.J. 388. The opinions of the Court of Military Appeals in the remaining cases (Pet. App. 47a, 52a, 59a, 68a-69a, 76a, 83a, 92a, 104a) are unreported.

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[1] Unless otherwise noted, "Pet. App." refers to the appendix to the petition in No. 86-826.

## JURISDICTION

The judgment of the Court of Military Appeals in No. 86-826 in the cases of petitioners Thomas, Cook, and Giarratano was entered on September 22, 1986 (86-826 Pet. App. 1a). The judgments in No. 86-825 and in the remaining cases in No. 86-826 were entered between September 23, 1986, and October 10, 1986 (86-825 Pet. App. 21a, 22a; 86-826 Pet. App. 47a, 52a, 59a, 68a, 76a, 83a, 92a, 104a). The petitions for writs of certiorari in No. 86-825 and No. 86-826 were filed on November 21, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. II) 1259(3).

## STATEMENT

1. The 13 petitioners are soldiers under the control of the Third Armored Division of the United States Army stationed in Germany. They were convicted in separate courts-martial of various crimes under the Uniform Code of Military Justice (UCMJ).[2] Petitioners' claims stem from the comments and activities of the court-martial convening authority, Major General Thurman E. Anderson, and his subordinates prior to petitioners' separate trials.[3]

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[2] Eleven of the 13 petitioners pleaded guilty to the charges against them. Petitioners Giarratano and McCallum pleaded not guilty. Giarrantano was tried before a military judge sitting as a special court-martial, and McCallum was tried before a general court-martial composed of officer members. Pet. App. 33a, 71a-72a.

[3] In conjunction with his assumption of command, General Anderson became the general court-martial convening authority. The convening authority is the officer who has authority to convene a court-martial. This position in the military justice system has no civilian counterpart. The duties of the convening authority have been characterized as both judicial

a. Major General Anderson assumed command of the Third Armored Division, headquartered in Frankfurt, Germany, on February 19, 1982. During the period from April to December 1982, General Anderson spoke at approximately ten different meetings, held at different locations throughout his command, at which the topic of testifying on behalf of accused soldiers at courts-martial was raised. General Anderson's extemporaneous remarks were typically made in the course of lectures and discussions on a variety of topics. As the Court of Military Appeals summarized (Pet. App. 2a-3a), General Anderson "found it paradoxical for a unit commander, who had recommended that an accused be tried by a court-martial authorized to adjudge a punitive discharge, to later appear as a defense character witness at the sentencing stage of the trial, testify as to the accused's good character, and recommend that the convicted soldier

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and quasi-prosecutorial. See *United States* v. *Yslava,* 18 M.J. 670, 674 (A.C.M.R. 1984) (en banc), remanded, No. 50410 (C.M.A. Sept. 25, 1986), new review and action ordered, No. 44515 (A.C.M.R. Oct. 15, 1986); *United States* v. *Ellsey,* 16 C.M.A. 455, 37 C.M.R. 75 (1966). The convening authority receives criminal charges from an "accuser," usually an accused's immediate commander, along with recommendations from the defendant's chain of command as to an appropriate disposition. The convening authority ultimately decides whether there is sufficient evidence to justify a court-martial and, if so, what level of court-martial is appropriate. This process is known as "referral." See Arts. 1(9), 32, 33, 34, UCMJ, 10 U.S.C. (& Supp. III) 801(9), 832, 833, 834. The convening authority has a variety of other duties affecting the court-martial proceeding, which include selecting the court-martial members (if the accused requests a panel), approving pretrial agreements, and granting immunity. See Rule 503(a)(1), 705(a), 704(c), *Manual for Courts-Martial, United States—1984.*

be retained in the service." The court noted that "[s]ome of General Anderson's remarks were elaborated upon and possibly distorted by his subordinates. Be that as it may, his comments were later interpreted, or misinterpreted, to reflect an intent that a commander, first sergeant, or other person from an accused's unit, should not give favorable presentencing testimony on behalf of an accused. This interpretation may have also extended to findings" at the guilt stage of courts-martial (*id.* at 3a).[4]

b. In late January or early February 1983, a military defense attorney in the course of a pretrial interview discovered that a noncommissioned officer believed that a policy existed in the Third Armored Division against servicemen offering favorable testimony at a court-martial in a defendant's behalf (Giarratano Tr. 827-828). The matter was brought to the attention of, and rectified by, the staff judge advocate, who regarded the matter as an isolated incident (McCallum Gov't C.A. Exh. 1, at 2). On February 28, 1983, however, the staff judge advocate became aware of a policy letter issued by the Third Armored Division command sergeant major, a subordinate of General Anderson, which discouraged noncommissioned officers from providing character

[4] While no transcripts of General Anderson's remarks exist, the interpretations given his comments by those in attendance can be found in the testimony of witnesses and the exhibits filed in the course of subsequent litigation, particularly in the trial record in petitioner Giarratano's case. The military trial and appellate courts have extensively detailed the facts surrounding General Anderson's comments. These facts, and the effect they had on witnesses, are discussed in *United States* v. *Treakle*, 18 M.J. 646, 649-653 (A.C.M.R. 1984) (en banc), remanded, No. 47978 (C.M.A. Sept. 22, 1986).

testimony in a defendant's behalf (*ibid.*).[5] At General Anderson's direction, immediate steps were taken to correct any misperceptions stemming from his remarks and from the command sergeant major's policy letter (*ibid.*),[6] although those measures were later determined to have been ineffective (Giarratano Tr. 1444-1445).

On March 14, 1983, General Anderson was interviewed by nine attorneys from the Army Trial Defense Service regarding the comments attributed to him (Giarratano AX 65). When questioned about the purpose of his comments, General Anderson ex-

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[5] On January 25, 1983, Command Sergeant Major Haga issued Noncommissioned Officers Professionalism Program Letter 16, entitled Personal Conduct and Integrity (Giarratano AX 12). As an enclosure to the letter, Sergeant Haga provided a list of "do's and don'ts," one of which stated that noncommissioned officers do not "stand before a court martial jury * * * and state that even though the accused raped a woman or sold drugs, he is still a good soldier on duty" (*ibid.*). General Anderson did not see, review, or approve of that letter before it was issued, and he did not learn of its existence until March 1, 1983. *Treakle*, 18 M.J. at 651.

[6] The Army Court of Military Review explained in *Treakle* (18 M.J. at 652): "Attempts were made to stop further distribution of the letter. The staff judge advocate personally called subordinate commanders to advise them to disregard the letter and to expect a written retraction." At meetings with subordinate commanders and senior noncommissioned officers on three occasions in early 1983, the general emphasized that there was no policy against testifying favorably for accused persons at courts-martial and that any such impression created by previous statements or letters was erroneous. He also emphasized that there was a legal and moral obligation to testify favorably. The Division command sergeant major met with senior noncommissioned officers on March 10, 1983, and advised them to disregard that part of his letter involving testifying at courts-martial. *Ibid.*

plained that he found it inconsistent for a commander to recommend that a soldier be subjected to a court-martial at which he could receive a punitive discharge and subsequently to testify on the soldier's behalf that he should be kept in the Army (*id.* at 11). In addition, on March 4 and September 15, 1983, General Anderson issued command policy letters emphasizing the obligation to testify in an accused soldier's behalf (Giarratano AX 49-50).

Litigation over this matter soon followed.[7] On October 2, 1983, extensive litigation of the command influence issue began in the special court-martial of petitioner Giarratano.[8] After receiving and considering extensive evidence concerning Giarratano's command influence motion, the trial judge found that General Anderson was not disqualified from serving as the convening authority (Giarratano Tr. 1438). Nonetheless, the trial judge found that General Anderson's remarks amounted to unlawful command influence, in violation of Article 37, UCMJ, 10 U.S.C. 837 (Giarratano Tr. 1442, 1447). The trial judge found by clear and convincing evidence, however, that petitioner's chain of command was not affected by General Anderson's remarks (*id.* at 1447).

The command influence issue was also litigated in the case of petitioner Ivy (Pet. App. 42a-46a) and

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[7] See *United States* v. *Sherman*, 21 M.J. 787 (A.C.M.R. 1986) (tried Mar. 28, 1983); *United States* v. *Yslava*, *supra* (tried June 9, 1983); *United States* v. *Kennedy*, 21 M.J. 879 (A.C.M.R. 1986) (tried July 5, 1983).

[8] The trial lasted 14 days between October 2 and December 10, 1983, and involved 54 witnesses, 123 exhibits, and over 1400 pages of testimony, nearly all of which was devoted to the command influence issue.

others. In some cases, including that of petitioner Smith (Pet. App. 50a), defense counsel were aware of this issue, but elected not to raise it. Litigation of the issue continued even after General Anderson's departure from command in March 1984.

c. On June 29, 1984, the Army Court of Military Review in *United States* v. *Treakle*, 18 M.J. 646 (A.C.M.R. 1984), determined that General Anderson was not disqualified as an "accuser" from participating in the referral process (18 M.J. at 655). The court recognized that General Anderson had attempted to correct what he perceived to be a command influence problem, and it found that his original comments were "marked by confusing communication rather than deliberate attempts to pervert the military justice system" (*ibid.*). While recognizing that the interpretation given to General Anderson's remarks varied widely (*id.* at 650-651), the court determined that General Anderson's comments could reasonably have been understood to discourage servicemen from offering favorable character testimony in a defendant's behalf and therefore amounted to unlawful command influence, in violation of Article 37(a), UCMJ, 10 U.S.C. 837(a).[9] Subsequent liti-

[9] Article 37(a) provides, in pertinent part:

> No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of

gation of the command influence issue in the Army Court of Military Review has resulted in 35 published opinions. That court and the Court of Military Appeals have awarded defendants some form of relief in all but 37 of the 219 cases reviewed to date.[10]

2. On September 22, 1986, the Court of Military Appeals, after noting the extensive remedial actions by the Army Court of Military Review, affirmed the convictions of petitioners Thomas, Cook, and Giarratano (Pet. App. 1a-19a). The Court of Military Appeals concluded that General Anderson had only an official interest in petitioners' trials and was therefore not disqualified from serving as the convening authority under Article 1(9), UCMJ, 10 U.S.C. 801(9) (Pet. App. 7a-8a). The Court of Military Appeals also concluded that the harmless error standard of *Chapman* v. *California*, 386 U.S. 18 (1967), rather than a rule of per se reversal, was appropriate in the case of unlawful command influence. Applying that standard, the Court of Military Appeals found beyond a reasonable doubt that the findings and sentences in the cases of petitioners Thomas, Cook, and Giarratano were not affected by command influence (Pet. App. 14a-16a). The court affirmed the convictions of the remaining petitioners

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any convening, approving, or reviewing authority with respect to his judicial acts.

[10] The relief granted included post-trial evidentiary hearings pursuant to *United States* v. *Dubay*, 17 C.M.A. 147, 37 C.M.R. 411 (1967), to determine whether General Anderson's actions had any effect on a defendant's case; new post-trial reviews and actions by a different convening authority pursuant to Article 64(b), UCMJ, 10 U.S.C. (Supp. III) 864(b); rehearings as to sentence; new trials; sentence reassessments by the Army Court of Military Review; and remedial action by the Judge Advocate General.

on the basis of its decision in *Thomas* (Pet. App. 47a, 52a, 59a, 68a-69a, 76a, 83a, 92a, 104a).

## ARGUMENT

This case demonstrates the ability and the willingness of the military justice system to discover and remedy instances of improper command influence. In a thoughtful and comprehensive opinion, the Court of Military Appeals conducted a careful examination of this unusual incident and its potential effects on courts-martial within the Third Armored Division. At the conclusion of that review, the court determined that the Army trial and appellate courts had taken the necessary steps to ensure that no servicemember was denied a fair trial.[11] The decision

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[11] In each of petitioners' cases, the Army Court of Military Review and the Court of Military Appeals specifically found that the relief granted was sufficient to cure any prejudice arising from General Anderson's comments, or that no relief was warranted.

Petitioners Thomas, Thompson, Holmes, and Jones were given rehearings as to their sentence and new post-trial reviews by a different convening authority (Pet. App. 14a, 23a-24a, 26a, 56a, 59a, 79a, 82a; 86-825 Pet. App. 24a). Petitioners McCallum, Schlote, Shepherd, and Ware received new post-trial reviews and actions by a different convening authority (*id.* at 72a, 89a, 95a; 86-825 Pet. App. 28a). Petitioner Defibaugh received a post-trial evidentiary hearing pursuant to *Dubay* to determine whether General Anderson's remarks had any effect on his case. The hearing showed that the remarks did not affect Defibaugh's trial (*id.* at 63a-64a, 66a-67a, 68a). Petitioner Cook had his sentence reassessed by the Army Court of Military Review, resulting in his not receiving a bad conduct discharge (*id.* at 30a). Petitioner Ivy litigated this issue at trial, and the trial judge rejected his motion to dismiss the charges. The Army Court of Military Review found that General Anderson's actions did not affect Ivy's convictions on the charge as to which he had pleaded guilty, but

of the Court of Military Appeals, upon which we largely rely, is correct and does not warrant further review. Moreover, that court's resolution of statutory and procedural issues unique to the military justice system is entitled to considerable deference by this Court. Finally, the relief afforded by the courts below is sufficient to cure any prejudice petitioners could have suffered. Accordingly, further review is not warranted.

1. Petitioners contend (86-826 Pet. 11-18) that General Anderson should have been disqualified from acting as the convening authority in their cases on the ground he was an "accuser" within the meaning of Articles 22(b) and 23(b), UCMJ, 10 U.S.C. 822(b) and 823(b). That claim lacks merit.

The question whether an officer is an "accuser" is entirely a matter of statutory construction. Articles 22 and 23, UCMJ, 10 U.S.C. 822 and 823, list the persons who may convene a general or special court-martial. Articles 22(b) and 23(b) provide that, if an officer is an "accuser," he may not order a general or a special court-martial, and a superior officer shall instead make that decision. The term "accuser" is defined in Article 1(9), UCMJ, 10 U.S.C. 801(9); it includes any person who signs and swears to charges, any person who directs that charges be signed and sworn to by another, and "any * * * per-

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the court dismissed Ivy's conviction on the charge as to which he had been convicted after pleading not guilty (*id.* at 54a-46a). Petitioner Giarratano litigated the issue at trial. The trial judge ordered that certain remedial action would be taken to offset any prejudice, including post-trial review by a different convening authority (*id.* at 16a, 34a-36a). Only petitioner Smith received no relief. Smith, however, declined to raise the issue at trial "'for ta[c]tical and strategic purposes'" (*id.* at 50a, 52a).

son who has an interest other than an official interest in the prosecution of the accused" (Pet. App. 7a).

The Court of Military Appeals has consistently interpreted the term "accuser" to disqualify only those officers who have a personal interest in the outcome of the case. The leading case construing that term is *United States* v. *Gordon*, 1 C.M.A. 255, 2 C.M.R. 161 (1952). There, the Court of Military Appeals analyzed Article 8 of the Articles of War, 10 U.S.C. (1946 ed.) 1479, the statutory predecessor to Articles 1(9), 22(b), and 23(b) of the UCMJ. Article of War 8 provided that, when a commander authorized to appoint a general court-martial was the accuser of the person to be tried, the court was to be appointed by a superior competent authority. After examining the origin and history of that standard,[12] the Court of Military Appeals concluded that a convening authority was disqualified as an "accuser" when, on the facts and circumstances of the case, he was so closely connected to the offense that "a reasonable person would impute to him a personal feeling or interest in the outcome of the litigation" (*Gordon*, 1 C.M.A. at 260, 2 C.M.R. at 166). Since its decision in *Gordon*, the Court of Military Appeals has consistently applied that standard to determine whether a convening authority was disqualified from referring a case to trial.[13]

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[12] For example, in 1918 the Attorney General concluded that an "accuser" should not have "any personal feeling or interest in the conviction of the [accused]." 16 Op. Atty Gen. 106, 110, quoted in *Gordon*, 1 C.M.A. at 259, 2 C.M.R. at 165.

[13] See, *e.g.*, *United States* v. *Corcoran*, 17 M.J. 137, 138 (C.M.A. 1984); *United States* v. *Crossley*, 10 M.J. 376, 378 (C.M.A. 1981); *United States* v. *Cansdale*, 7 M.J. 143, 145

The Court of Military Appeals correctly applied the standard adopted in *Gordon* to petitioners' cases. Nothing in General Anderson's remarks supports the claim that he had a personal interest in the outcome of any of these cases. As the Court of Military Appeals explained (Pet. App. 7a), General Anderson was not the victim of a crime (*United States* v. *Gordon*, *supra*) or the person who gave an order that was willfully disobeyed (*United States* v. *Corcoran*, 17 M.J. 137 (C.M.A. 1984)). Rather, his remarks were directed to what he perceived as a general practice followed by unit commanders, not to the facts of any particular case. Those remarks would not lead a reasonable person to conclude that General Anderson had an interest in seeing any particular servicemember prosecuted or sentenced in any particular manner.

Petitioners contend (85-826 Pet. 11-18) that the Court of Military Appeals adopted an unduly narrow construction of Article 1(9), and they claim that General Anderson should have been disqualified under that Article because he was "impliedly biased." As the convening authority responsible for referring cases to courts-martial, General Anderson performed the same role that the grand jury serves in the civilian justice system. He should have been disqualified from performing that role, petitioners argue, because his views on character evidence rendered him unable to make an unbiased decision whether to refer the charges against them to a court-martial. That argument is flawed in several respects.

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(C.M.A. 1979); *United States* v. *Conn*, 6 M.J. 351, 354 (C.M.A. 1979); *United States* v. *Reed*, 2 M.J. 64, 68 (C.M.A. 1976); *Brookins* v. *Cullins*, 23 C.M.A. 216, 218, 49 C.M.R. 5, 7 (1974); *United States* v. *McClenny*, 5 C.M.A. 507, 511, 18 C.M.R. 131, 135 (1955).

To begin with petitioners' analogy is flawed. A convening authority is not the factfinder; instead, his role during the referral and pretrial process has been compared to that of a prosecutor. See *Cooke* v. *Orser*, 12 M.J. 335, 343 (C.M.A. 1982); *United States* v. *Hardin*, 7 M.J. 399, 404 (C.M.A. 1979); *United States* v. *Yslava*, 18 M.J. 670, 674 (A.C.M.R. 1984). The appropriate parallel, therefore, is not to a claim that the factfinder was impliedly biased, but to the claim that the prosecutor was animated by an invidious motive. See *Wayte* v. *United States*, 470 U.S. 598 (1985). Petitioners have not made that claim, however, and General Anderson's remarks would not support such a claim if it had been made.

In addition, 11 of the 13 petitioners pleaded guilty to the crimes for which they were convicted (page 2 note 2, *supra*) and therefore may not claim that their convictions should be reversed on this ground. See *Tollett* v. *Henderson*, 411 U.S. 258 (1973) (guility plea waives claim of grand jury discrimination).[14] The two remaining petitioners (Giarratano and McCallum) had an opportunity to demonstrate that General Anderson was actually

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[14] The Army Court of Military Review found (where the claim was raised) that petitioners' decisions to plead guilty were not affected by General Anderson's remarks, and the Court of Military Appeals upheld the decisions of the Court of Military Review (86-825 Pet. App. 21a, 22a, 24a, 28a; 86-826 Pet. App. 14a, 23a, 31a, 44a-45a, 47a, 50a, 52a, 55a, 59a, 67a, 68a, 79a, 82a, 83a, 87a, 92a, 101a, 104a). The Court of Military Appeals also found (Pet. App. 10a) no evidence that General Anderson intended by his actions to induce guilty pleas. And none of these petitioners has argued in this Court that his guilty plea was coerced by General Anderson's actions or was inaccurate in any respect. Accordingly, these petitioners have waived their claim of implied bias.

biased against them, and the opportunity to make such a showing is all that due process generally requires (see *Smith* v. *Phillips*, 455 U.S. 209 (1982)). In their cases, the courts below found that General Anderson's actions had no effect on the outcome of their trials (Pet. App. 16a, 35a-36a, 74a, 76a). There is no evidence that General Anderson harbored any prejudice of any type towards petitioners, or that he was even aware of them before their cases were presented to him in his capacity as convening authority for referral to a court-martial. Petitioners do not argue to the contrary.

Finally, even assuming that the decision of a convening authority to refer a case to a court-martial should ever be set aside on the ground that he was impliedly biased (but cf. *United States* v. *Mechanik*, No. 84-1640 (Feb. 25, 1986); *Beck* v. *Washington*, 369 U.S. 541, 548-549 (1962) (requiring the defendant to establish actual bias on a claim that his conviction should be reversed because the grand jury was exposed to prejudicial publicity)), petitioners have failed to demonstrate that this is an appropriate case in which to adopt such a rule.[15] There is no allegation in any of these cases that charges were inappropriate or were unsupported by the evidence presented to General Anderson. Nothing in his statements suggests that General Anderson had prejudged petitioners' guilt or had referred their cases

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[15] Petitioners also argue (86-826 Pet. 22-24) that command influence should be subjected to the same standard of review as racial prejudice in a grand jury proceeding (*Rose* v. *Mitchell*, 443 U.S. 545 (1979)). The policy against unlawful command influence does not rise to that level. Cf. *United States* v. *Mechanik*, slip op. 5 n.1.

to a court-martial for an improper reason.[16] Furthermore, unlike the case in which the convening authority is the victim of a crime, there is no reason to presume that General Anderson was incapable of

[16] The incidents that petitioners use (86-826 Pet. 6-7) to illustrate General Anderson's intense interest in military justice do not relate to any of petitioners' cases. Furthermore, the incidents referred to do not reflect any personal interest in the outcome of any case, or bias on General Anderson's part. The first incident, which involved a sergeant driving under the influence of alcohol and leaving the scene of an accident, occurred during one of many routine unannounced inspections conducted by General Anderson (Giarratano Tr. 1077). Prior to inspecting the barracks area, General Anderson asked to see the battalion vehicle registration book (*id.* at 1078). When General Anderson discovered that the vehicle the sergeant was driving when he had the accident was not listed in the book, he concluded that the chain of command was not doing its job, and he chastised the first sergeant (*id.* at 1078-1079). General Anderson did not attempt to influence the chain of command to take any disciplinary action against the sergeant or to communicate to anyone that he should not testify on the sergeant's behalf if he were to be court-martialed (*id.* at 1078-1080).

The second incident involved an inquiry by General Anderson to the chain of command regarding a Sergeant Fanning, whose name appeared on the military police blotter (a daily chronological record of police activity) for the third or fourth time (Giarratano Tr. 446). The sergeant major of Fanning's unit answered the phone, and General Anderson ascertained from him that one of Sergeant Fanning's prior blotter entries involved adultery, and that his current problems involved drugs (*ibid.*). Thereafter, General Anderson expressed his concern that an individual repeatedly in trouble should still hold the rank of sergeant—traditionally a rank associated with leadership and responsibility (*ibid.*). The sergeant major went on to testify that he felt his commander was never pressured by General Ander-

reviewing the evidence in an impartial manner to decide whether petitioners should be tried. In fact, that is precisely the type of inquiry that the courts performed to determine whether General Anderson

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son into taking any action in that case, or in any other case (*id.* at 457-458).

The other incidents referred to by petitioners involve contact between General Anderson's legal advisor and the commander of a military police unit. Petitioners quote liberally from the MP commander's affidavit but fail to note that the legal advisor answered those allegations in an affidavit of his own (Thomas Gov't C.A. Exh. 4). The legal advisor categorically denied that General Anderson ever told him he was displeased with the testimony of the commander, or that he ever told the commander General Anderson had said that he was upset (*id.* at paras. 9(f) and (g)). Likewise, the legal advisor unequivocally stated the commander was "wrong" when he said the legal advisor communicated General Anderson's displeasure at the retention and non-classification of a soldier who was court-martialed (*id.* at para. 10(b)). The legal advisor explained that he made several calls to the MP commander to explain to him that Army regulations required the soldier to be reclassified because the soldier had been convicted and could no longer be a military policeman (*id.* at para. 10(e)). Finally, the legal advisor stated that much of the conversation between the advisor and the MP commander revolved around the MP commander's dissatisfaction with the disposition of some court-martials, and did not involve General Anderson's views at all (*id.* at paras. 7(d) and 9(b)).

Notably, the discrepancies between the affidavits of the legal advisor and the MP commander were extensively litigated in a Third Armored Division case, *United States* v. *Thompson,* 19 M.J. 690 (A.C.M.R. 1984), new review and action ordered, CM 444070 (A.C.M.R. Oct. 9, 1986). In a limited hearing on the command influence ordered by the Army Court of Military Review, the military judge heard the respective contentions of the parties concerning the affidavits, reviewed the evidence, and entered special findings. The military judge found that the affidavit and supporting

should have been disqualified under Article 1(9) as an "accuser." And, as the extensive litigation in this case makes clear, there is no reason to conclude that an evidentiary hearing was inadequate to determine whether General Anderson was actually prejudiced against petitioners.

2. Petitioners also contend (85-825 Pet. 15-24; 85-826 Pet. 18-26) that they were denied the right to a fair trial by the actions of General Anderson and his subordinates. Petitioners do not argue that the relief awarded in the post-trial proceedings ordered by the Army Court of Military Review was inadequate to ensure that they were not prejudiced. Rather, the gravamen of petitioners' argument is that the only way to ensure the elimination of the command influence prohibited by Article 37 of the UCMJ, 10 U.S.C. 837, is to adopt a rule of per se reversal for every case in which a commanding officer violates Article 37 in some manner. The Court of Military Appeals therefore erred, petitioners contend, by applying the constitutional harmless error standard of *Chapman* v. *California*, 386 U.S. 18 (1967), instead of reversing every conviction without inquiry into the question of prejudice. That argument lacks merit, for several reasons.

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memoranda proposed by the MP commander "are summarizations, conclusions and perceptions he admitted may be wrong" (Special Findings (B)(6), at 4). The judge also found that "[a]t no time" did the legal advisor state to the MP commander "that MG Anderson was upset with [the MP commander's] testimony. The offending statements attributed to [the legal advisor] and implicitly to General Anderson were the conclusions of [the MP commander] based on philosophical concepts and a rehash of [a previous] case" (Special Findings (B)(4)).

First, the Court of Military Appeals' decision to apply the *Chapman* harmless error standard is fully consistent with congressional intent. Congress did not intend that all instances of command influence in violation of Article 37 should result in reversal without regard to whether the accused had been prejudiced. Like the federal criminal justice system, the military system has a harmless error statute, Article 59(a), UCMJ, 10 U.S.C. 859(a). That statute expressly provides that an error not affecting the substantial rights of a servicemember must be disregarded, and it does not treat violations of Article 37 differently from other types of errors. Compare 28 U.S.C. 2111. The legislative history of Article 59(a) discloses that it was adopted to permit a reviewing court "to sustain a finding of guilty even though error had been committed when it can be determined that the error does not materially prejudice the substantial rights of the accused" (S. Rep. 486, 81st Cong., 1st Sess. 25 (1949)). It is therefore not surprising that the courts have consistently looked to whether the defendant was prejudiced by command influence. See, *e.g.*, *United States* v. *McClain*, 22 M.J. 124 (C.M.A. 1986); *United States* v. *Dubay*, 17 C.M.A. 147, 37 C.M.R. 411 (1967).[17]

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[17] The cases cited by petitioner are not to the contrary. See *Engels* v. *United States*, 678 F.2d 173, 175 (Ct. Cl. 1982) (burden to show prejudice on an officer evaluation report resulting from command influence is on the claimant); *Calley* v. *Callaway*, 519 F.2d 184, 216 (5th Cir. 1975), cert. denied, 425 U.S. 911 (1976) (command influence raised but defense unable to present a "colorable showing" that any officers involved in the trial process were affected); *Homcy* v. *Resor*, 455 F.2d 1345, 1352-1356 (D.C. Cir. 1971) (command influence infected sentencing procedure; specific prejudice noted and relief granted).

Second, the decision below is fully consistent with this Court's decisions. As the Court of Military Appeals recognized (Pet. App. 13a), the most likely effect of General Anderson's remarks would have been to discourage servicemembers from offering favorable testimony in support of an accused at trial or sentencing. This Court has refused to adopt a rule of per se reversal in a variety of similar contexts when a defendant is denied the opportunity to offer potentially exculpatory evidence.[18] Moreover, as the Court explained last Term in *Rose* v. *Clark*, No. 84-1974 (July 2, 1986), slip op. 7-8, "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless error analysis." Those conditions were satisfied in these cases. Petitioners do not claim that General Anderson's remarks affected the trial judges or their defense counsel. In fact, Congress and the military have taken steps to ensure that trial judges and defense counsel are insulated from command influence.[19]

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[18] See, *e.g.*, *Crane* v. *Kentucky*, No. 85-5238 (June 9, 1986), slip op. 9 (denying a defendant the right to testify regarding the circumstances of his confession can be harmless); *Delaware* v. *Van Arsdall*, No. 84-1279 (Apr. 7, 1986), slip op. 8-11 (denying a defendant the right to impeach a witness for bias can be harmless); *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 872-874 (1982) (a defendant must show that a witness deported by the government would have provided favorable testimony to establish a constitutional violation); *Rugendorf* v. *United States*, 376 U.S. 528, 534-536 (1964) (failure to disclose informant's identity does not require reversal in the absence of prejudice).

[19] Military judges are insulated from the convening authority or any member of his staff. Under 10 U.S.C. (Supp. III) 826(c), an individual who is certified and qualified for

Third, there was no need for the Court of Military Appeals to adopt a rule of per se reversal in the exercise of its supervisory powers to deter a pattern of intentional lawlessness that could not be remedied in any other manner. General Anderson's actions were neither a deliberate attempt to disrupt the court-martial process nor part of a systematic effort to deny defendants in the Third Armored Division the opportunity to present favorable testimony at trial. As the Army Court of Military Review concluded in *Treakle* (18 M.J. at 655), "General Anderson's actions were marked by confusing communication rather than deliberate attempts to pervert the military justice system." Moreover, the Army and the Army Court of Military Review took numerous steps to reduce the effects of General Anderson's unfortunate remarks on the court-martial process and to remedy any prejudice that a servicemember may have suffered. Petitioners have failed to explain why these steps were insufficient to ensure that they received a fair trial.[20]

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duty as a military judge may perform such duties only when he or she is assigned and directly responsible to the Judge Advocate General or his designee. Notably, 75% of the 219 trials involving this particular command influence issue were tried before a military judge alone.

Moreover, since November 1980 all Army defense counsel have been part of an independent organization, the United States Army Trial Defense Service. See Dep't of Army Reg. 27-10, para. 6-2 (Sept. 25, 1986). As a result, all Army defense counsel are professionally insulated from any adverse consequences of their zealous representation of clients.

[20] Petitioners' contention (86-825 Pet. 18-20; 86-826 Pet. 25 n.33) that command influence is a serious threat to the military justice system that can be remedied only by a rule of per se reversal is contradicted by the cases they cite. The

Articles 1(9) and 37(a) of the Uniform Code of Military Justice are unambiguous and have been given meaningful effect by the military court system. The remedies provided by the military courts on a case-by-case basis are indicative of the military's ability to deal effectively with the problem of command influence. In fact, contrary to the image of military justice presented in the petitions (86-825 Pet. 18-19; 86-826 Pet. 21-22), the extensive litigation of the unlawful command influence issue by the courts below demonstrates the ability of the military justice system to police itself and to correct instances of unlawful command influence when they arise. At every stage in this litigation, from discovery of the problem by members of the Army's independent Trial Defense Service, to litigation at the trial level before members of the independent trial judiciary, to review in the military appellate courts, petitioners have been ably served by a system designed to assure the fairness of their individual trials. These courts have concluded that petitioners were not prejudiced by the isolated and unfortunate incidents that gave rise to these cases. Further review is not warranted.

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decisions by the military courts in those cases indicate that the case-by-case determination whether a defendant has been prejudiced is an effective safeguard against unlawful command influence.

## CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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